82-481

No. .....

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In the Supreme Court of the United States

OCTOBER TERM

COTTON BELT INSURANCE CO., INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Dated: August 20, 1982

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QUESTIONS PRESENTED

1. Whether a surety's procedural due process guarantees under the federal Constitution are violated when its bond is forfeited by a federal court and the court gives no notice of the forfeiture.

2. Whether procedural due process guarantees under the federal Constitution may be validly waived by entering a contract written according to the Government's terms where there is great disparity in the bargaining strength of the contracting parties.

3. Whether bail bond contracts entered pursuant to Federal Rule of Criminal Procedure 46 are to be construed according to state or federal law.

4. Whether the language of Federal Rule of Criminal Procedure 46 is unconstitutionally vague.

5. Whether requiring a surety of a bail bond contract to appoint the court's clerk as the surety's agent for service of process violates due process guarantees.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Apeals for the Ninth Circuit entered in the proceeding on June 17, 1982.

OPINION BELOW

The opinion of the Court of Appeals, which has not been published, appears in the Appendix hereto. No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 17, 1982. This Petition for Writ of Certiorari has been filed within 90 days of that date. This

Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The sole petitioner herein is Cotton Belt Insurance Co., Inc.

STATUTORY PROVISIONS INVOLVED

I. United States Code, Title 18:

Federal Rules of Criminal Procedure, Rule 46:

(e) Forfeiture.

(1) Declaration. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(f) Exoneration. When the condition of the bond his been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

* * * * * * * * *

II. California Penal Code Section 1305:

> (a) If, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or upon any other occasion when his presence in court is lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes and the undertaking of bail, or the money deposited instead of bail, as the case may be, must thereupon be declared forfeited, and, if the amount of the forfeiture exceeds one hundred dollars ($100), the clerk of the court shall, promptly upon entering the fact of such failure to appear in the minutes, mail notice of the forfeiture to the surety on the bond or depositor of money instead of bond, and shall execute an affidavit of such mailing and place it in the court's file in the case. If the surety is an authorized corporate surety insurer, and if the bond has plainly printed or stamped thereon the address of its principal office in California, such notice shall be mailed to such surety at such address, and mailing to the bail agent or solicitor who posted the bond shall not constitute compliance with this section; the clerk shall at the same time send a copy of such notice to the bail agent or solicitor who posted the bond. If the clerk fails to mail such notice within 30 days after such entry, the surety or depositor shall be released from all obligations under the bond....

STATEMENT OF THE CASE

Petitioner, Cotton Belt Insurance Co., Inc., served as surety for the bail release of federal criminal defendants, Arthur H. Biagas and David Dix. The terms of their bail bond contracts were of the standard form mandated by the federal government, pursuant to Federal Rules of Criminal Procedure, Appendix of Forms, Form 17.

Biagas and Dix breached these bonds by not appearing in the Federal District Court for the Central District of

California when required to appear. The District Court, therefore, ordered forfeiture of the bonds. The Biagas bond was for $4,000.00; Dix's was for $25,000.00.

Three Hundred Forty-Eight (348) days and 273 days after forfeiture of the Dix and Biagas bonds, respectively, the surety first learned of the breaches. The surety's first knowledge of the breaches came from a letter sent by the United States Attorney that demanded payment of the bonds.

The surety moved the District Court to vacate these forfeitures. A hearing for the motion was granted, but the motion was denied without opinion. The surety appealed the District Court's denial to the Ninth Circuit Court of Appeals, which sustained the denial.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With the Law of California.

   A. California Law Requires State Courts to Notify Bail Bond Sureties of Bond Forfeitures Within the Reasonable Time of 30 Days of Forfeiture. Federal Law Has No Similar Notice Requirement.

   B. Under California Law, Constitutional Rights May Not Be Waived by Entering Adhesion Contracts. Federal Law Permits the Contrary.

II. There Is Conflict Among the Circuits Concerning These Issues.

   A. Some Circuit Courts Apply State Law in Construing Bail Bond Contracts Written Pursuant to Federal Rule of Criminal Procedure 46, While Others Apply Federal Law.

   B. Some Circuit Courts Require Federal Courts to Give Notice to Bail Bond Sureties of Circum-

stances That Increase the Sureties' Risks. Other Circuit Courts Have No Similar Requirement.

III. The Decision Below Involves Important Federal Questions That Have Not Been, But Should Be, Settled by This Court.

A. Due Process Guarantees Under the Federal Constitution Are Directly at Issue in This Case.

B. This Conflict of Law Causes Confusion and Uncertainty.

DISCUSSION OF REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With the Law of California.

A. CALIFORNIA LAW REQUIRES STATE COURTS TO NOTIFY BAIL BOND SURETIES OF BOND FORFEITURES WITHIN THE REASONABLE TIME OF 30 DAYS OF FORFEITURE. FEDERAL LAW HAS NO SIMILAR NOTICE REQUIREMENT.

California Penal Code § 1305 requires state court clerks to send notice to bail bond sureties whose bonds have been forfeited. This notice must be mailed within 30 days of the forfeiture, otherwise "the surety or depositor shall be released from all obligations under the bond." California Penal Code § 1305(a).

The California Supreme Court, in examining California Penal Code Section 1305, noted:

> "There are sound reasons . . . implicit in the pertinent statutory provisions for holding that a forfeiture of a bail bond, where required, must be timely declared. The law traditionally disfavors forfeitures and statutes imposing them are to be strictly construed. . . . In the instant case the statute purports to afford the surety of an opportunity to escape the harsh results of the forfeiture. When a declaration of forfeiture has been made the clerk of the court must 'promptly . . . mail notice of the forfeiture to the surety.' If such notice is not delivered for a period of 30 days, the surety is to

be 'released from all obligations under the bond.'" *People v. United Bonding Ins. Co.*, 5 Cal.3d 898, 906, 489 P.2d 1385 (1971), quoting Penal Code § 1305.

The court explained the strong public policy behind the statute:

> "If a surety is to be afforded the protections provided by these provisions he must be advised at an early date of the fact of the forfeiture in order that he may institute procedures to locate and compel the appearance of the bailee. Should the surety not have an early opportunity to institute these endeavors the possibility of discharging the forfeiture will be severely prejudiced, and it is manifest that he will suffer such prejudice whether there is an undue delay in advising him after the declaration of a forfeiture or a delay in making the declaration itself." *People v. United Bonding Ins. Co., supra,* 906.

Federal law provides no such protection or guide to reasonableness. Federal Rule of Criminal Procedure 46 is silent regarding any such notice of forfeiture to sureties. Some federal courts, therefore, simply state no notice of forfeiture need be given to sureties. *U.S. v. Marquez,* 564 F.2d 379 (10th Cir. 1977). In these federal courts, sureties are necessarily subject to the prejudice California policy avoids with Penal Code § 1305; sureties will not have an early opportunity to "institute procedures to locate and compel the appearance of the bailee," and "the possibility of discharging the forfeiture will be severely prejudiced. . . ." *People v. United Bonding Ins. Co., supra,* 906.

This conflicts between California policy and the opinions of some federal courts could be avoided by the United States Supreme Court holding, as it did in *International Union v. Hoosier Cardinal Corp.,* 383 U.S. 696, 86 S.Ct.

1107, 16 L.Ed.2d 192 (1966), that silence in a federal statute should not be deemed to mean federal courts are free to make "federal common law" that conflicts with state law. In *International Union v. Hoosier Cardinal Corp., supra,* Section 301 of the Labor Management Relations Act of 1946, 29 U.S.C. § 185, was at issue. The section contained no statute of limitations for bringing an action under the Act. It was argued federal courts should have been able to create their own limitations. The Supreme Court disagreed:

> "That Congress did not provide a uniform limitations provision for Section 301 suits is not an argument for judicially creating one. . . . . [I]t cannot be fairly inferred that when Congess left Section 301 without a uniform time limitation, it did so in the expectation that the courts would invent one. . . ." *International Union v. Hoosier Cardinal Corp., supra,* 703.

B. UNDER CALIFORNIA LAW, CONSTITUTIONAL RIGHTS MAY NOT BE WAIVED BY ENTERING ADHESION CONTRACTS. FEDERAL LAW PERMITS THE CONTRARY.

In *Blair v. Pitchess,* 5 C.3d 258, 486 P.2d 1242 (1971), the California Supreme Court held there could be no valid waiver of constitutional rights under the Fourth Amendment of the federal Constitution by entering an adhesion contract. This doctrine was expanded in *Isbell v. County of Sonoma,* 21 C.3d 61, 577 P.2d 188 (1978), where the California Supreme Court held Fourteenth Amendment due process prohibits a county from enforcing certain confessions of judgment. Enforcing these confessions of judgment would have violated due process guarantees since it is "settled constitutional law that 'in every case involving a deprivation of property within the purview of the due process clause, the Constitution requires some form of notice and a hearing.'" *Isbell v. County of Sonoma, supra,*

68, quoting *Beaudreau v. Superior Court,* 14 C.3d 448, 458, 535 P.2d 713 (1975).

Although the California Supreme Court has held procedural due process requires notice before depriving a person of property by the state enforcing a one-sided agreement it entered, some federal courts impliedly hold contra. They do so by enforcing bail bond agreements against sureties without giving prompt notice of forfeitures, which effectively deprives the sureties of their property interests in the bonds without due process.

II. There Is Conflict Among the Circuits Concerning These Issues.

A. SOME CIRCUIT COURTS APPLY STATE LAW IN CONSTRUING BAIL BOND CONTRACTS WRITTEN PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 46, WHILE OTHERS APPLY FEDERAL LAW.

There is disagreement and uncertainty among the federal circuit courts whether state or federal law is to be used in construing bail bond contracts written pursuant to Federal Rule of Criminal Procedure 46. In *United States v. Martinez,* 613 F.2d 473 (3rd Cir. 1980), the court recognized this conflict:

> "Courts of appeals have disagreed on the question whether federal or state law governs the interpretation of bail bonds filed with federal courts. Those holding that state law applies simply assert in conclusory fashion that a contract should be interpreted according to the law in which it was made." *U.S. v. Martinez, supra,* 476, citing *U.S. v. D'Anna,* 487 F.2d 899 (6th Cir. 1973); *U.S. v. Gonware,* 415 F.2d 82 (9th Cir. 1969); and *Palermo v. U.S.* 61 F.2d 138 (8th Cir. 1932), cert. denied, 288 U.S. 600, 53 S.Ct. 318, 77 L.Ed. 976 (1933).
>
> * * * * * * *
>
> Other circuits, however, have "held that federal common law should be applied because '[f]ederal regulation of bail provisions in the federal courts is perva-

> sive, . . . Federal bail bonds may have distinctive features not found in state bonds,' and 'federal fiscal interests are affected.'" *U.S. v. Martinez, supra,* 477, citing *U.S. v. Catino,* 562 F.2d 1, 2 (2nd Cir. 1977); and *U.S. v. Miller,* 539 F.2d 445 (5th Cir. 1976).

Some federal courts believe a "bail bond contract must be interpreted in light of the applicable law of the state in which the contract was made." *U.S. v. Wray,* 389 F.Supp. 1186, 1190 (W.D. Missouri, 1975), citing *U.S. v. D'Anna, supra; U.S. v. Gonware, supra; Palermo v. U.S., supra; Swanson v. U.S.,* 224 F.2d 795 (9th Cir. 1955); and *Heine v. U.S.,* 135 F.2d 914 (6th Cir. 1943). Other courts consider such language dictum. *U.S. v. Vera- Estrada,* 577 F.2d 598 (9th Cir. 1978). Whether such language is dictum or a rule of law will remain uncertain until this Court settles the issue.

B. SOME CIRCUIT COURTS REQUIRE FEDERAL CLERKS TO GIVE NOTICE TO BAIL BOND SURETIES OF CIRCUMSTANCES THAT INCREASE THE SURETIES' RISKS. OTHER CIRCUIT COURTS HAVE NO SIMILAR REQUIREMENT.

In *U.S. v. Egan,* 394 F.2d 262 (2nd Cir. 1968), cert. denied sub nom., *Stuyvesant Ins. Co. v. U.S.,* 393 U.S. 838, 89 S.Ct. 116, 21 L.Ed.2d 109 (1968), the court stated:

> "Where the court modifies the terms of a bond on its own motion, the clerk of the court should give reasonable notice of the change to the government, the defendant and the surety in advance of the effective date of the modification in order that the parties may be heard or the surety may take any steps it deems necessary to surrender the defendant to custody." *U.S. v. Egan, supra,* 267.

One circuit court has said this language is dictum since *Egan* "never reached the ticklish legal issue because it up-

held the court's finding that the surety knew of this change." *U.S. v. Robinson,* 453 F.Supp. 1, 3 (S.D.N.Y., 1977). *Robinson* continued, however:

> ". . . this court believes that this circuit has set a minimum duty on the Government to notify the surety when its risk has been significantly increased. . . . *Egan* recognizes that a surety cannot be expected to be constantly in court to monitor the proceedings. . . . *Egan* stands for the notion that the surety must be notified when the Government becomes aware that the risk of flight has increased." *U.S. v. Robinson, supra,* 3.

Despite this "notion," other federal courts say no notice is required even after the principal has absconded and the bail has been forfeited. *U.S. v. Caro,* 56 F.R.D. 16 (S.D. Fla., 1972); and *US. v. Vera-Estrada, supra.* The federal circuits are, therefore, in direct conflict: some require notice to a surety whenever the "risk of flight has increased." Others hold no notice is required even after the principal has failed to appear—a time when the "risk of flight" is greatest.

III. The Decision Below Involves Important Federal Questions That Have Not Been, but Should Be, Settled by This Court.

A. DUE PROCESS GUARANTEES UNDER THE FEDERAL CONSTITUTION ARE DIRECTLY AT ISSUE IN THIS CASE.

> "Ingrained in our concept of due process is the requirement of notice. . . . Notice is required before property interests are disturbed. . . . Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." *Lambert v. California,* 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957)

Whenever a surety enters a bail bond contract with the federal government pursuant to Federal Rule of Criminal

Procedure 46, the surety faces the possibility of having its property interests in the bond forfeited without any assurance of having its constitutional rights to procedural due process protected. The lack of a uniform notice requirement, as discussed above, contributes to this problem; so too does the federal government's willingness to enforce these one-sided contracts without also giving prompt notice of forfeitures.

These same constitutional implications have been recognized by federal courts in other forfeiture cases. In, for example, *U.S. v. Premises Known As 608 Taylor Ave.*, 584 F.2d 1297 (3d Cir. 1978), the court held forfeitures of contraband must be afforded due process protection. Such forfeitures must be done within a reasonable time, for "if reasonable time limitations are not placed upon the application of . . . [the applicable forfeiture statutes], a question of the constitutionality of the statutes could be raised." *U.S. v. One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977); and, in accord, *Sarkisian v. U.S.*, 472 F.2d 468 (10th Cir. 1973).

The basis of these courts' recognition of the constitutional ramifications surrounding such forfeitures is the same as that underlying California Penal Code Section 1305, as discussed above. Due process demands, whether contraband or bonds are forfeited, that there be "some form of notice and a hearing." *Isbell v. County of Sonoma, supra*, 68.

Other constitutional issues are present here—whether "timely surrender" under Federal Rule of Criminal Procedure 46 is unconstitutionally vague; and whether requiring sureties to "irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served," as prescribed by Federal Rule of Criminal

Procedure 46(e)(3), violates due process guarantees.

These issues have never been decided by the United States Supreme Court; a decision is needed now. Until this Court settles these issues, constitutional rights afforded sureties will remain in jeopardy.

B. THIS CONFLICT CAUSES CONFUSION AND UNCERTAINTY.

These issues are decided inconsistently from one circuit to another. Thus, because of this conflict of law, sureties face uncertainty and confusion when entering into bail bond contracts. Sureties do not know whether state or federal law applies in construing these contracts, or whether their constitutional rights are being waived. Sureties are unsure if bonds are to be forfeited without notice, or forfeited after a reasonable time or when else they are to be forfeited.

The uncertainty and confusion caused by this conflict will remain until this Court settles these issues. Until this conflict is resolved, federal trial and appellate courts will continue to spend valuable time applying inconsistent legal principles and circumscribing constitutional rights.

CONCLUSION

For the above reasons, petitioner respectfully prays this Court to issue a Writ of Certiorari to review the judgment and opinion of the court below so that the conflict surrounding these cases may be settled.

Dated: August 20, 1982

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Appendix

1. Opinion and Judgment of the Court of Appeals.
2. Filing and Spreading Judgment of the Court of Appeals.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 1982, three copies each of the Petition For Writ of Certiorari were mailed, postage paid, to Andrea Sheridan Ordin, United States Attorney, Central District of California and to Sara Criscitelli, Esq., and the Solicitor General of the United States.

CHRIS A. SCHAEFER
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Counsel for Petitioner

Do Not Publish

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ARTHUR H. BIAGAS, *Defendant,* COTTON BELT INSURANCE COMPANY, INC., *Surety and Real Party in Interest-Appellant.*	No. 81-5210 D.C. No. CR 79-247
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. DAVID DIX, *Defendant,* COTTON BELT INSURANCE COMPANY, INC., *Surety and Real Party in Interest-Appellant.*	No. 81-5211 D.C. No. CR 79-608

MEMORANDUM

Argued and submitted — March 4, 1982
Decided — June 17, 1982

Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, District Judge, Presiding

Before: ELY and CANBY, Circuit Judges, and EAST,* District Judge.

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Cotton Belt Insurance Co. (Cotton Belt), as surety real party in interest, appeals from an order of the District Court denying its motion to vacate forfeitures of two bail bonds to exonerate it from liability on those bonds. The cases were consolidated in the District Court and on appeal because they present indentical issues. We affirm.

Acting as a surety, Cotton Belt posted bail bonds to secure the release of defendants Biagas and Dix from Government custody. The defendants failed to appear at trial, thereby violating the express provisions of the bail bond contract. The District Court then ordered forfeiture of the bonds, but Cotton Belt was not notified of the forfeitures for 273 days in the Biagas case and 348 days in the Dix case.

Rule 46(e) of the Federal Rules of Criminal Procedure sets forth a statutory procedure for the forfeiture of bail bonds, including provisions for the declaration of a forfeiture upon a breach of the conditions of the bond agreement, the setting aside of a forfeiture in the interest of justice, the entry of a judgment of default when a forfeiture has not been set aside, and, after such a judgment has been entered, the complete or partial remission of it when it appears that justice does not require the enforcement of the forfeiture. Rule 46(f) provides that the court shall exonerate the obligors and release any bail when the conditions of the bond have been satisfied or when a forfeiture has been set aside or remitted. Further, Rule 46(f) provides for the exoneration of a surety either by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

Cotton Belt contends that Rule 46(e) and (f) are, unless supplemented or interpretated in accordance with California or common law, constitutionally infirm. Cotton Belt argues that Rule 46(e) fails to satisfy procedural due process requirements because it does not provide for ade-

quate notice of forfeiture to the surety, and that 46(f) is unconstitutionally vague because it does not specifically indicate when a surety's surrender of a defendant into custody is "timely" for purposes of determining whether the surety may be exonerated.

Any alleged vagueness in the term "timely surrender" is irrelevant in this case, because it is undisputed that Cotton Belt never surrendered either of these defendants into custody. Except in cases involving First Amendment freedoms, challenges to statutes on the grounds of vagueness must be evaluated under the facts of the particular case. *United States v. Powell*, 423 U.S. 87, 92 (1975); *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *United States v. Louderman*, 576 F.2d 1383, 1388 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978). Rule 46(f) is perfectly clear that, where there is no surrender of the defendant into custody, the surety may not be exonerated on the bond for a "timely" surrender.

In *United States v. Vera-Estrada*, 577 F.2d 598 (9th Cir. 1978), this court squarely held that Rule 46 does not require that a surety may be notified of its principal's failure to appear:

> [R]ule 46(e), Fed. R. Crim. P., establishes the procedures which are to be followed in the federal courts for the enforcement of liability of the surety. Notice is required when the government moves for judgment, but not when the defendant fails to appear and his bond is forfeited. * * * It is the *surety's responsibility to ensure the defendant does appear and learn when he does not.* * * *

Id. at 599-600. (Citations omitted). (Emphasis supplied.)

Cotton Belt attempts to distinguish *Vera-Estrada* on the grounds that the surety in that case argued that a California state statute relating to notice of forfeiture was an

implied term of the bail bond contract. Cotton Belt disclaims any such argument, but offers the same state statute as a "guide to interpretation," insisting that the bail bond contract here must be read against the "background" of either state or common law in order to avoid alleged due process vagueness and notice problems. We disagree. Neither Rule 46 nor the bail bond contract here is vague; they simply do not require that notice of forfeiture be given to the surety. Thus no "guide to interpretation" is required in this case.

Further, notice of forfeiture is not required to satisfy the requirements of due process. By contracting to act as surety, Cotton Belt undertook contractual obligations to insure the presence of its principals at trial. Cotton Belt therefore had a duty to remain apprised of the whereabouts of its principals. *Vera-Estrada,* 577 F.2d at 600; *United States v. Marquez,* 564 F.2d 379, 380 (10th Cir. 1977); *United States v. Payne,* 272 F. Supp. 939, 941 (D. Conn. 1967). Had Cotton Belt fulfilled its contractual duties, it would have had actual notice that its principals failed to appear.

Cotton Belt next contends that the failure of the District Court clerk to promptly notify it of its principals' failure to appear rendered cure of its breach impossible. We disagree. It was Cotton Belt's failure to remain apprised of its principals' whereabouts and to learn of their failure to appear which diminished its ability to cure its breach.

Next, Cotton Belt contends that the bail bond agreements are contracts of adhesion. In particular, it challenges the provision appointing the District Court clerk as the surety's agent for service of process and the provision which states that the surety is "bound" to pay the bond "forthwith," which Cotton Belt interprets as a waiver of its right to contest immediate payment or to receive notice of forfeiture so

that it may make a "timely surrender" of the principal. These arguments are without merit. Cotton Belt freely undertook the obligation to pay its principals' bonds in the event they failed to appear at trial. It cannot now reasonably contend that this obligation was forced upon it by the Government. Further, as noted above, Cotton Belt had no right to notice of forfeiture to waive.

Finally, Cotton Belt contends that equitable principles entitle it to exoneration on the bond. This argument amounts to no more than a recasting of the "impossibility defense" defense argument, and is rejected for the same reasons.

The judgments of the District Court in No. 81-5210 and in No. 81-5211 are each affirmed.

AFFIRMED.

United States District Court
Central District of California
CRIMINAL MINUTES—GENERAL

Case No. CR-79-247-RJK
CR-79-608-RJK

Date: July 16, 1982

Docket Entry:

Present: Hon. Robert J. Kelleher, Judge

James Kimball	N/A	
Deputy Clerk	Court Reporter	Asst. U.S. Attorney

U.S.A. v. (Defendants Listed Below)

(1) Arthur Biagas
___ present ___ custody ___ bond ___ O/R

(2) David Dix
___ present ___ custody ___ bond ___ O/R

(3)
___ present ___ custody ___ bond ___ O/R

(4)
___ present ___ custody ___ bond ___ O/R

Attorneys For Defendants

(1)
___ present ___ appointed ___ retained

(2)
___ present ___ appointed ___ retained

(3)
___ present ___ appointed ___ retained

(4)
___ present ___ appointed ___ retained

Proceedings:

Re: Appeal of Cotton Belt Insurance Company after Bond Forfeiture

THE COURT having received the mandate of the U.S. Court of Appeals, Ninth Circuit, affirming the judgment of the U.S. District Court in forfeiting the bonds in the above-named cases.

IT IS ORDERED that the judgment of the Court of Appeals is hereby filed and spread upon the minutes of this court.

AUSA—Strike Force

William Murphy
68 Mitchell Blvd. #250
San Rafael, CA 94903

Minutes Form 6
Crim—Gen

Initials of Deputy Clerk _____

Office - Supreme Court, U.S.
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DEC 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-481

In the Supreme Court of the United States

OCTOBER TERM, 1982

COTTON BELT INSURANCE CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether notice to a surety that the defendant has failed to appear is constitutionally required before the surety's bond may be forfeited.

2. Whether federal bail bonds must be interpreted in accordance with the law of the state in which they are written.

3. Whether a due process requirement of direct notice to the surety of an increase in the risk that the defendant may flee applies to situations where the defendant has already fled.

4. Whether Fed. R. Crim. P. 46 is unconstitutional because it requires sureties to enter into adhesion contracts or because it is unconstitutionally vague.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A6) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1982. The petition for a writ of certiorari was filed on September 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 25, 1979, defendant David Dix failed to appear in the United States District Court for the Central District of California for trial. The court therefore forfeited a $25,000 bond written by petitioner, Cotton Belt Insurance Co., Inc. Arthur Biagas, charged in a different proceeding in the same district, failed to appear for a pre-trial status

hearing on December 10, 1979. The district court accordingly ordered forfeiture of a $4,000 bond, also written by petitioner. On September 30, 1980, petitioner moved to vacate both forfeitures (E.R. 1-2, 46-47).[1] The district court denied petitioner's motions (E.R. 35, 85) and the court of appeals affirmed (Pet. App. A2-A6).

1. On March 13, 1979, defendant Arthur Biagas was arrested on a complaint charging sale, conveyance and disposition of a stolen Treasury check, in violation of 18 U.S.C. 641.[2] At arraignment Biagas was released on his own recognizance. Biagas was subsequently indicted on three counts of possession of stolen mail, in violation of 18 U.S.C. 1708, and was again released on his own recognizance. After he failed to appear for a status hearing in April 1979, a bench warrant was issued. Biagas was arrested in June 1979 in the Northern District of California, at which time he posted a $1,000 cash bond to secure his release. Biagas again failed to appear at another proceeding scheduled in July 1979 in the Central District of California. The magistrate ordered another warrant, raised the bail to $4,000, and forfeited the $1,000 cash bond. That warrant was executed in August 1979. In August or September 1979 Biagas posted a $4,000 corporate surety bond written by petitioner. Biagas failed to appear at a status hearing in December 1979, at which time counsel informed the court that he did not know where Biagas was. The district court accordingly ordered another warrant and forfeited the $4,000 bond. The warrant was executed in February 1980, upon Biagas' voluntary surrender. Biagas pleaded guilty shortly thereafter to one count of the indictment.

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[1]"E.R." refers to the excerpt of record filed in the court of appeals.

[2]The details of Biagas' and Dix's arrest and prosecution are derived from the government's brief in the court of appeals.

Defendant David Dix was arrested in July 1979 and filed two corporate surety bonds for $25,000 each.[3] On August 1, 1979, Dix was indicted on two counts of unlawful possession and sale of narcotics, in violation of 21 U.S.C. 841(a)(1). Bail was continued and the trial date was set for late September 1979. Defendant failed to appear on that date. The district court accordingly issued a bench warrant and ordered forfeiture of the two $25,000 bonds (Pet. 4; Pet. App. A3).

2. On September 30, 1980, petitioner moved to vacate both forfeitures (E.R. 1-2, 46-47). In identical affidavits filed with the motions, petitioner's agents admitted posting the forfeited bonds, but stated that until September 10, 1980, they had no notice or knowledge that the defendants had breached the terms of their bonds. The agents added that the breaches were without their "knowledge, consent, connivance or collusion" (E.R. 3-6, 48-51). Petitioner urged that notice of the defendants' failure to appear is necessary to give the surety an opportunity to find and return them in order to take advantage of the exoneration provisions in Rule 46, Fed. R. Crim. P. Petitioner further contended that California law, which provides for such notice, should be "applied as a guide, not * * * interpreted as part of the bail contract, but * * * implied as a guide as to what is reasonable notice" (Biagas Tr. 4, 11; see also Dix Tr. 4).[4]

The district court rejected petitioner's arguments, noting that the purpose of bail is to insure the defendant's appearance as ordered, not to provide for private bounty hunters (Biagas Tr. 10). The court stated that when petitioner writes a bond without "tak[ing] an awfully good look at the kind of person they are dealing with" and without subjecting the

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[3]Only one of the bonds was posted by petitioner.

[4]"Biagas Tr." and "Dix Tr." refer to the transcripts of the separate hearings on petitioner's motions to vacate the forfeitures.

defendant himself to any personal financial risks from flight, the effectiveness of bail is significantly reduced (Biagas Tr. 8-9; Dix Tr. 5). The court of appeals, on similar grounds, subsequently affirmed the district court's denial of petitioner's motions (Pet. App. A2-A6).

ARGUMENT

Fed. R. Crim. P. 46 governs the forfeiture procedures for federal bail bonds. By entering into a bond, the "obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served" (Rule 46(e)(3)). If there is a breach of a condition of the bond, "the district court shall declare a forfeiture of the bail" (Rule 46(e)(1)). Entry of judgment on the forfeiture is made by motion of the court (Rule 46(e)(3)). Prior to entry of such judgment, however, the "motion and such notice of the motion as the court prescribes" are served on the clerk of the court, "who shall forthwith mail copies to the obligors to their last known addresses" (*ibid.*). Even after entry of judgment, the forfeiture may nevertheless be remitted "if it appears that justice does not require the enforcement of the forfeiture" (Rule 46(e)(2), (4)).

Thus, Rule 46 sets forth in unambiguous detail the procedures to be followed in declaring and enforcing a forfeiture. It plainly provides for pre-judgment notice to the obligor as well as post-judgment remission as the needs of justice require, and just as plainly does not call for notice prior to the essentially ministerial act of declaring a forfeiture. Therefore, contrary to the assertions of petitioner, there is no need to refer to state law as an "aid" in interpreting the provisions of Rule 46, nor does the rule deny petitioner due process. The issues raised by petitioner clearly do not merit the attention of this Court.

1. Petitioner contends (Pet. 10-12) that forfeiture of bail without direct notice to the surety of the principal's breach violates due process. The court of appeals properly rejected this claim. The Constitution does not require that those who breach a contract be given an opportunity to remedy the breach. The requirements of due process, furthermore, are fully met here. The obligor on the bond is not deprived of any property by the declaration of a forfeiture under Rule 46(e)(1), but only by the subsequent entry of a judgment under subsection (e)(3). The latter provision does prescribe notice to a surety before entry of judgment against the surety.[5] Moreover, as the court of appeals explained, notice to the surety of the principal's breach should not be required because "[b]y contracting to act as surety [petitioner] undertook contractual obligations to insure the presence of its principals at trial. [Petitioner] therefore had a duty to remain apprised of the whereabouts of its principals. [*United States* v.] *Vera-Estrada*, 577 F.2d [598, 600 (9th Cir. 1978)]; *United States v. Marquez*, 564 F.2d 379, 380 (10th Cir. 1977); *United States v. Payne*, 272 F. Supp. 939, 941 (D. Conn. 1967). Had [petitioner] fulfilled its contractual duties, it would have had actual notice that its principals failed to appear" (Pet. App. A5).

2. The court of appeals was not obligated to incorporate a state law notice requirement into the Federal Rules of Criminal Procedure. As the court below found (Pet. App. A5), Rule 46 is quite clear — notice of a defendant's failure to appear need not be given the surety. Additionally, the bond and accompanying documents filed with the district

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[5]Thus, petitioner's suggestion (Pet. 11) that bail bond forfeitures are accomplished without "some form of notice and a hearing" is incorrect. Nor does petitioner dispute the fact that it received notice before judgment was executed against it: petitioner's complaint is solely that the notice was given too late for it to recover the defendants and be entitled (in its view) to exoneration.

court make plain that petitioner understood that, should the defendants fail to appear, the bail would immediately be forfeited. Accordingly, there is no need to apply state law as either a term of the federal contract or a guide to its interpretation.

Thus, there is no reason for this Court to consider petitioner's claim (Pet. 8-9) of conflict among the circuits on the question whether federal bail contracts need be interpreted in accordance with state or federal law. None of the cases cited by petitioner holds that state procedural requirements are entitled to preference over the Federal Rules of Criminal Procedure where, as in this case, both address the same problem.[6] Moreover, as this Court recognized in *United*

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[6]In any event, the conflict cited by petitioner is more apparent than real. Although courts in three circuits have stated that federal bail bonds should be interpreted in light of state substantive law (*United States* v. *D'Anna*, 487 F.2d 899 (6th Cir. 1973); *United States* v. *Gonware*, 415 F.2d 82 (9th Cir. 1969); *Palermo* v. *United States*, 61 F.2d 138 (8th Cir. 1932), cert. denied, 288 U.S. 600 (1933)), those cases all rely on a repealed federal statute that required federal arrest and bail practices to conform to state law. *United States* v. *Carr*, 608 F.2d 886, 887 n.1 (1st Cir. 1979); *United States* v. *Miller*, 539 F.2d 445, 447 (5th Cir. 1976). At the time *Palermo* v. *United States*, *supra*, was decided, for example, a federal statute provided that the "conditions of a bail bond given in United States courts are generally governed by the laws of the state in which the court is located" (61 F.2d at 140, citing Act of Sept. 24, 1789, (ch. 20, Section 33, 1 Stat. 91), (formerly codified at 18 U.S.C. (1946 ed.) 591) (repealed 1948)). The Ninth Circuit in *United States* v. *Gonware*, *supra*, 415 F.2d at 83, simply cited *Palermo* v. *United States*, *supra*, and other early cases relying on former 18 U.S.C. 591 for its conclusion that state law governs the construction of federal bail bonds. The Sixth Circuit similarly cited *Gonware* and *Palermo* for its identical conclusion. *United States* v. *D'Anna*, *supra*, 487 F.2d at 900. As has been recently noted by the First, Second and Fifth Circuits, however, this approach is erroneous. *United States* v. *Carr*, *supra*, 608 F.2d at 887; *United States* v. *Catino*, 562 F.2d 1, 2 (2d Cir. 1977); *United States* v. *Miller*, *supra*, 539 F.2d at 447. There is no longer a statutory direction to interpet federal bail bonds in light of state law. Procedures and conditions for admission to bail in the federal courts and for revocation and modification of bail are now extensively

States v. *Seckinger*, 397 U.S. 203, 209 n.12 (1970), "the validity and construction of contracts [by] the United States * * * present questions of federal law not controlled by the law of any State." In this instance, the contract is purely a federal one implicating only federal interests. Consequently, it is irrelevant that the federal rule relating to notice of default on a federal bond is different from California's statutory requirement for notice of state bond defaults. See *United States* v. *Catino*, 562 F.2d 1 (2d Cir. 1977). Cf. *United States* v. *Gillock*, 445 U.S. 360, 368 (1980).

3. Contrary to petitioner's claim (Pet. 9-10), the decision below does not conflict with other cases requiring notice to a surety when its risk has been significantly increased. See *United States* v. *D'Anna*, 487 F.2d 899, 901 (6th Cir. 1973); *United States* v. *Egan*, 394 F.2d 262, 267 (2d Cir.), cert. denied, 393 U.S. 838 (1968). Those decisions involve instances of a material change in circumstances before the defendant has fled. In *D'Anna*, for example, the court continued bond without notice to the surety for a period of time after

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governed by the Bail Reform Act of 1966, 18 U.S.C. 3141 *et seq.* Forfeiture and exoneration are controlled by subsections (e) and (f) of Rule 46, Fed. R. Crim. P. "In view of the pervasive federal regulation of federal bail procedures and conditions, we believe that the interpretation of bail contracts to which the government is a party is and should be controlled by federal common law." *United States* v. *Miller*, *supra*, 539 F.2d at 447 n.2. Thus, to the extent that there is any conflict on the issue whether state or federal law governs the construction of federal bail bonds, the conflict is not significant inasmuch as the legal error that lies at the center of the conflict is apparent. Indeed, the Ninth Circuit recently revisited the question of whether state or federal law governs the construction of federal bail bonds, and, based on the Second and Fifth Circuits' reasoning in *Catino* and *Miller*, concluded that its earlier statement in *Gonware* was "dictum" that "is not controlling." *United States* v. *Vera-Estrada*, 577 F.2d 598, 599 (9th Cir. 1978). Moreover, the cases holding that federal bail bonds should be interpreted in light of state substantive law do not suggest that state procedural requirements, such as the notice issue in this case, should prevail over federal procedural rules. See, e.g., *United States* v. *D'Anna*, *supra*, 487 F.2d at 901.

sentencing to allow the defendant to arrange his affairs, during which period the risk of flight was clearly more pronounced. Such pre-flight notice of changed conditions thus is designed to help the surety both to protect his interest and produce the defendant. Once the defendant fails to appear, however, the "risk of flight" has matured into the certainty of flight, and the rationale for pre-flight notice no longer applies.

4. The remaining claims raised by petitioner are equally meritless. Whatever vagueness challenges may be made to Fed. R. Crim. P. 46(f), which provides for exoneration in the event of a "timely surrender" of the defendant, they clearly do not apply here. See Pet. App. A4. One defendant has not yet been recovered since his flight in September 1979; even if he were to appear tomorrow, his surrender would not be "timely" under any reasonable interpretation. And although the other defendant voluntarily surrendered two months after his bond was forfeited, petitioner never argued timeliness of the surrender to the district court as a ground for total or partial exoneration. Thus, assuming *arguendo* that Rule 46(f) is vague in marginal fact situations (*United States* v. *Powell*, 423 U.S. 87, 93 (1975)), petitioner is in no position to challenge as vague the rule's application in these cases.

Nor is a bail bond contract between the government and a surety an impermissible contract of adhesion that requires the surety to waive its constitutional right to notice. As the court below found (Pet. App. A6), "[petitioner] freely undertook the obligation to pay its principals' bonds in the event they failed to appear at trial. It cannot now reasonably contend that this obligation was forced upon it by the Government." See also *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174 (1972) (a cognovit clause permitting judgment without notice is not necessarily unconstitutional).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1982

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